

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CHARLES H. COLL, DOLORES	§	
McCALL, MARGARET ASCHER,	§	
BEACH PARTNERSHIP, LTD.,	§	
HERIBERTO F. LONGORIA, JR.	§	CIVIL ACTION
MARK BEATTY dba COBRA	§	NO. 2:08-CV-345 (TJW)
PETROLEUM COMPANY, and	§	
DAVID L. KUNDYSEK dba	§	
SOUTHWEST PETROLEUM COMPANY,	§	
Plaintiffs,	§	
	§	
	§	MOTION TO DISMISS
VS	§	
	§	
	§	
ABACO OPERATING, LLC, ET AL.	§	
	§	
Defendants.	§	

DEFENDANT EL PASO E&P ZAPATA, L.P.’S
MOTION TO DISMISS FOR IMPROPER VENUE,
SUBJECT TO ITS MOTION TO SEVER

Subject to its motion to sever, and in conjunction with its Motion to Dismiss for Failure to State a Claim and its Motion to Transfer Venue,¹ Defendant El Paso E&P Zapata, L.P. (“El Paso Zapata”) files this motion to dismiss Plaintiffs’ suit for improper venue, as authorized by Federal Rule of Civil Procedure 12(b)(3), and shows the Court as follows:

A. Introduction

Plaintiffs have sued El Paso Zapata, along with 116 other defendants in the Eastern District of Texas, Marshall Division. They are asking the Court to certify a class including “royalty owners under oil and gas leases owned and/or operated by Defendants,

¹ Defendant has joined in with other defendants in filing the motions to sever, dismiss for failure to state a claim, and motion to transfer venue.

as well as non-operating working interest owners.” See First Amended Complaint (“FAC”), Docket No. 118, at ¶ 142.

Venue is improper as to El Paso Zapata in the Eastern District; therefore, the Court should dismiss this suit.

B. Argument

If an action is filed in an improper judicial district, the court may dismiss the action upon timely objection. 28 U.S.C. § 1406(a). The Court should dismiss this case because a substantial portion of Plaintiffs’ claim against El Paso Zapata, if any, did not occur in the Eastern District of Texas. See 28 U.S.C. § 1391. “In determining whether or not venue is proper, the Court looks to the defendant’s conduct, and where that conduct took place.” *Bigham v. Envirocare of Utah, Inc.*, 123 F.Supp.2d 1046 (S.D. Tex. 2000) (citing *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th Cir.1995)).

El Paso Zapata is an oil and gas producer with its principle place of business in Houston. See Affidavit of Kenneth A. Veasley, attached as Exhibit A, at ¶ 3. El Paso Zapata does not produce any oil or gas whatsoever in the Eastern District of Texas. *Id.* at ¶ 7.

All of El Paso Zapata’s actions and managerial decisions regarding severance tax refund applications and accounting for the refunds of severance taxes to royalty owners and working interest owners have occurred in El Paso Zapata’s offices in Houston, Texas. *Id.* No part of El Paso Zapata’s severance tax refund application and accounting process has occurred in the Eastern District of Texas. *Id.* None of El Paso Zapata’s business records regarding severance tax accounting and refunds are located in the Eastern District of Texas. *Id.*

As such, venue is not proper in the Eastern District as to El Paso Zapata.

C. Prayer

Defendant El Paso Zapata requests that the Court dismiss this claim for improper venue under Rule 12(b)(3), and for such other relief to which it might be entitled.

Respectfully submitted,

By: /s/ D. Mitchell McFarland
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court on February 27, 2009 via its ECF filing system, which will send notification of such filing to all counsel of record who have appeared in this action.

/s/ D. Mitchell McFarland
D. Mitchell McFarland